RECORD AND BRIEFS

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE JAMES MADISON INSTITUTE; FLORIDA TAXWATCH; TEXAS PUBLIC POLICY FOUNDATION; YANKEE INSTITUTE; OKLAHOMA COUNCIL OF PUBLIC AFFAIRS; ADVANCE ARKANSAS INSTITUTE; INDEPENDENCE INSTITUTE; JOHN LOCKE FOUNDATION; SUTHERLAND INSTITUTE; CONSUMER FEDERATION OF THE SOUTHEAST; AND NATIONAL CENTER FOR PUBLIC POLICY RESEARCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JOSEPH W. JACQUOT
FOLEY & LARDNER LLP
1 Independent Dr.
Suite 1300
Jacksonville, FL 32202
(904) 359-2000
jjacquot@foley.com

JESSE PANUCCIO
Counsel of Record
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
(202) 672-5300
jpanuccio@foley.com

ROBERT HENNEKE
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
(512) 472-2700
rhenneke@texaspolicy.com

JOSHUA M. HAWKES
FOLEY & LARDNER LLP
106 E. College Ave.
Suite 900
Tallahassee, FL 32301
(850) 222-6100
jhawkes@foley.com

Counsel for Amici Curiae

November 21, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. STATE "SWIPE FEE" LAWS ARE RENT-SEEKING BANS ON SPEECH ABOUT ECONOMIC ACTIVITY, NOT BANS ON ECONOMIC ACTIVITY 5

II. STATE SWIPE-FEE SPEECH BANS ARE RIDDLED WITH INCONSISTENCIES THAT UNDERMINE THE SUPPOSED CONSUMER-PROTECTION RATIONALE. 10

A. States Inexplicably Exempt Millions Of Transactions From Their Swipe-Fee Speech Bans. 10

B. Swipe-Fee Speech Bans Create Hidden And Deceptive Costs That State Consumer-Protection Laws Typically Prohibit. 18

C. Swipe-Fee Speech Bans Invert The Role Of State Attorneys General 22

D. Swipe-Fee Speech Bans Are Vague And Permit Arbitrary Enforcement. 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993) 18
Connally v. Gen. Constr. Co.,
269 U.S. 385 (1926) 24
Dana's R.R. Supply v. Att'y Gen. of Fla.,
807 F.3d 1235 (11th Cir. 2015) 7
Dane v. Jackson,
256 U.S. 589 (1921) 6
Erznoznik v. Jacksonville,
422 U.S. 205 (1975) 18
FCC v. Fox Television Stations, Inc.,
132 S. Ct. 2307 (2012) 24
FCC v. League of Women Voters,
468 U.S. 364 (1984) 17
Ferguson v. Skrupa,
372 U.S. 726 (1963) 5
First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 17
Florida Star v. B.J.F.,
491 U.S. 524 (1989) 18
Holder v. Humanitarian Legal Project,
561 U.S. 1 (2010) 24
Hunt v. Wash. State Apple Adver. Comm'n,
432 U.S. 333 (1977) 22

Italian Colors Rest. v. Harris,
99 F. Supp. 3d 1199, 1206 (E.D. Cal. 2015) 23
Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,
335 U.S. 525 (1949) 6
Nebia v. New York,
291 U.S. 502 (1934) 6
New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) (Brandeis, J., dissenting) 5
People v. Fulvio,
517 N.Y.S.2d 1008 (N.Y. Crim. Ct. 1987) 22
Powell v. Pennsylvania,
127 U.S. 678 (1888) 6
Reed v. Town of Gilbert, Ariz.,
135 S. Ct. 2218 (2015) 18
Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 18
United States v. United Foods, Inc.,
533 U.S. 405 (2001) 8
Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 24
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 7
West Coast Hotel Co. v. Parrish,
300 U.S. 379 (1937) 6

Statutes

Cal. Bus. & Prof. Code §§ 17200 et seq..... 18

Cal. Bus. & Prof. Code § 17538.9 20
Cal. Civ. Code § 1748.1(e) 10
Cal. Civ. Code § 1748.1(f) 14
Cal. Civ. Code § 1770(a)(13) 20
Cal. Civ. Proc. Code § 1010.5 14
Cal. Food & Agric. Code § 31255(b) 14
Cal. Gov. Code § 6159(h) 14
Colo. Rev. Stat. § 5-2-212(1) 15
Colo. Rev. Stat. §§ 6-1-101 et seq. 18
Conn. Gen. Stat. § 20-327b 21
Conn. Gen. Stat. §§ 42-110a et seq. 18
Fla. Admin. Code § 69C-4.0045 12
Fla. Stat. § 215.332(3)(b) 12
Fla. Stat. § 215.332(5) 13
Fla. Stat. §§ 501.201 et seq. 18
Fla. Stat. §§ 817.41(2)-(3) 20
Kan. Stat. Ann. § 12-16,125 15
Kan. Stat. Ann. §§ 50-623 et seq. 18
Mass. Gen. Laws Ann. ch. 93A, §§ 1 et seq. 18
Me. Rev. Stat. Ann. tit. 5, §§ 205A et seq. 18
Me. Rev. Stat. tit. 9-A, § 8-509 15
Me. Rev. Stat. tit. 33, § 173 21
Me. Rev. Stat. tit. 33, § 174 21
N.Y. Crim. Proc. Law § 420.05 11
N.Y. Exec. Law § 63(12) and N.Y. 18
N.Y. Gen. Mun. Law § 349-50 11
N.Y. Pub. Auth. Law § 1045-j(4-a)(b) 11
N.Y. Tax Law § 1132(a)(1) 19
Okla. Stat. tit. 14A, § 2-211 15
Okla. Stat. tit. 15, §§ 751 et seq. 18
Okla. Stat. tit. 15, § 752 20
Okla. Stat. tit. 15, § 753 ..... 20, 21

Tex. Bus. & Com. Code Ann. §§ 17.41 18
Tex. Bus. & Com. Code § 17.46(b)(11) 20
Tex. Fin. Code § 339.001(b) 13

Other Authorities

A.G. Schneiderman Announces $158 Million Mobile Cramming Settlements With Sprint And Verizon, Attorney General of New York, http://on.ny.gov/2eJzB9P 19
Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 1 (2010) 7
Bruce Baker, *The Empty Promise and Untold Cost of Urban Renewal in Colorado* 5
Bureau of Consumer Frauds & Protection, Att'y Gen. of N.Y., http://on.ny.gov/2f7OrFK 22
Camera Violation Online, City of New York, http://on.nyc.gov/2eGm5lz 12

Consumer Frauds & Protection, Att'y Gen. of N.Y., http://on.ny.gov/2f7OrFK 22
Credit Card Convenience Fee FAQ, Cent. Conn. State Univ., http://bit.ly/2fk48qX 16
Tim Fang, *Credit Card Transaction Fee Goes Into Effect at San Francisco Parking Meters,* CBS SFBayArea, (Aug. 17, 2015 6:37 PM), http://cbsloc.al/2f4bjCI 14

The Federalist No. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961) 5
Fla. Dep't Fin. Servs., *Compliance Economic Review, Rule 69C-4.40045, Fla. Admin. Code, Convenience Fees* (Apr. 2013), *available at* http://bit.ly/2fzTwHB 13
Fla. Tax Watch Research Report, *Controlling Escalating Property Taxation and Local Government Spending and Revenue* (Dec. 2006) 5
Kathleen Hunker, *The Perils of Complete Regulation* 5
Zachary Janowski, *Does Connecticut Have Enough Healthcare?* 5
Memorandum from Kate Krell to Susan Stuntz & Jeff Ross, Hill & Knowlton (July 24, 1987) *available at* http://bit.ly/2fLyUNB 6
Parking Violations Issued – Fiscal Year 2015, City of New York, http://bit.ly/2eJMsJa 12
Pay and View Bills Online, City of Cambridge, http://bit.ly/2fYXkk1 17
Pay With Credit Card, Tex. Comptroller, http://bit.ly/2g0C1Rs 14
Sal Nuzzo, *Commercial Lease Tax Burden Hits Florida's Economy* 5
Scott M. Stringer, *NYC Budget Brief* (Mar. 2016), *available at* http://on.nyc.gov/2flOztB 12
Tax Payment Information FAQ, City of Hartford, http://bit.ly/2fk8iPX 7, 16

Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, Science, Jan. 30, 1981, at 453-58 7
View Bills Online, City of Boston, http://bit.ly/2f7Eqbz 17

STATEMENT OF INTEREST[1]

Amici curiae, submitting this brief in support of petitioners, are research and educational institutions that advocate for policies that protect and enhance free enterprise, particularly at the state level. Amici have a strong interest in assisting the public in rational economic decisionmaking.

The James Madison Institute is one of the nation's oldest and largest nonprofit, nonpartisan research and educational organizations. The institute's policy recommendations are rooted in the principles found in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility.

Florida TaxWatch is Florida's oldest and largest nonpartisan, nonprofit scientific public-policy research institute and taxpayer watchdog that works to improve the productivity and accountability of state government. The institute's independent research recommends productivity enhancements and explains the statewide impact of fiscal and economic policies and practices on citizens and businesses. For nearly four decades, Florida TaxWatch has pursued a three-pronged mission of improving taxpayer value, citizen understanding, and government accountability.

The Texas Public Policy Foundation is a nonprofit, nonpartisan research organization based in Aus-

---

[1] The parties have consented to the filing of this amicus curiae brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the Amici made a monetary contribution to its preparation. (Rule 37.6).

tin, Texas, and is dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, private enterprise, private property rights, and the rule of law. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to advance principles of liberty and the Constitution.

The Oklahoma Council of Public Affairs is a public-policy research organization that applies the principles of limited government, individual liberty, and free markets to state-level issues. The organization advocates for economic freedom and opposes excessive employment licensing that makes it harder for regular Americans to get jobs and start businesses.

The Yankee Institute for Public Policy is a 501(c)(3) research and citizen education organization that does not accept government funding. The Yankee Institute's mission is to promote free-market solutions and smart public policy so that every Connecticut resident is free to succeed. The Yankee Institute achieves this objective by informing, inspiring, and motivating citizens and decisionmakers.

The Independence Institute is a Colorado-based nonprofit organization that conducts research and seeks to educate citizens on a variety of public-policy issues, including government regulation of business, economic freedom, healthcare, criminal justice, education, and taxation.

The Advance Arkansas Institute is a nonprofit,

nonpartisan public policy research and educational organization based in Little Rock, Arkansas. The Advance Arkansas Institute focuses on promoting individual rights, free enterprise, personal responsibility, and government transparency.

The Sutherland Institute, based in Salt Lake City, Utah, is a nonprofit think tank. The Sutherland Institute is dedicated to pursuing the path to a new birth of freedom for America through a free-market economy, civil society, and community-driven solutions.

The John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. The John Locke Foundation employs research, journalism, and outreach programs to promote a vision for North Carolina of responsible citizens, strong families, and successful communities committed to individual liberty and limited, constitutional government.

The Consumer Federation of the Southeast ("CFSE") is a not-for-profit consumer group founded in 2003. CFSE is dedicated to consumer advocacy, with a focus on free-market consumerism and an emphasis on personal responsibility. CFSE's goal is to empower consumers to make informed decisions.

The National Center for Public Policy Research ("National Center") is a thirty-five-year-old think tank located in Washington, D.C. The National Center is dedicated to the belief that respecting the principles of a free market, limited government, individual liberty, and personal responsibility provide the most sound basis for successfully meeting the challenges facing America in the 21st century.

SUMMARY OF ARGUMENT

New York and nine other states purport to ban surcharges that pass through the costs imposed by credit-card companies and banks for credit-card transactions—costs known as "swipe fees." But each of these states simultaneously permits cash discounts from baseline prices that already incorporate credit costs. From an economic standpoint, what is permitted (marked-up price minus a cash discount reflecting the cost of credit) is exactly the same as what is banned (regular price plus a charge reflecting the cost of credit). Accordingly, what these laws really ban is a label; a name; speech. New York and other states contend these laws protect consumers and regulate *economic activity*, but what they really do is shield consumers from truthful *speech about economic activity*.

The bans' loopholes, contradictions, and ambiguities undermine any claimed consumer-protection purpose. First, each state that has a swipe-fee speech ban exempts its own government-run vendors. Second, swipe-fee labels convey truthful information about prices, and states typically require, rather than prohibit, such disclosure of hidden costs and risks. Third, state attorneys general typically police deceptive pricing, but these laws require them to suppress such information. And, fourth, these bans are so vague as to render them unintelligible to the average person, which only further clouds the pricing information available in the market.

ARGUMENT

I. STATE "SWIPE FEE" LAWS ARE RENT-SEEKING BANS ON SPEECH ABOUT ECONOMIC ACTIVITY, NOT BANS ON ECONOMIC ACTIVITY.

State statute books across the nation are replete with laws that interfere with the market. Some of these laws were passed with the intent to benefit consumers, some with the intent to benefit workers, some with the intent to benefit corporations. Several of these laws are simply bad policy,[2] passed with some patina of public purpose, while just under the surface lurks a powerful, rent-seeking faction that captured a legislative majority. *See* The Federalist No. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961) (minority factions, "united and actuated by some common impulse," can pass laws "adversed to the rights of other citizens, or to the permanent and aggregate interests of the community").

Unfortunate as some of these economic policies may be, generally they are constitutionally sound under this Court's precedent. State legislatures, as the laboratories of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), "have broad scope to experiment with economic problems," *Ferguson v. Skrupa*, 372 U.S.

---

[2] *See, e.g.*, Sal Nuzzo, *Commercial Lease Tax Burden Hits Florida's Economy*, James Madison Inst. (Apr. 2015); Fla. Tax Watch Research Report, *Controlling Escalating Property Taxation and Local Government Spending and Revenue* (Dec. 2006); Kathleen Hunker, *The Perils of Complete Regulation*, Tex. Public Policy Found. (July 2016); Zachary Janowski, *Does Connecticut Have Enough Healthcare?*, Yankee Inst. (Mar. 2015); Bruce Baker, *The Empty Promise and Untold Cost of Urban Renewal in Colorado*, Independence Inst. (Aug. 2016).

726, 730 (1963). Accordingly, this Court has held that states, whether "wise or unwise," *id.* at 732, may enact price controls, wage floors, bans on products, bans on professions, preferences for union or non-union workers, and income-redistribution programs. *See Nebia v. New York*, 291 U.S. 502 (1934) (price controls); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (product ban); *Ferguson*, 372 U.S. 726 (ban on profession); *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (laws prescribing hiring practices); *Dane v. Jackson*, 256 U.S. 589 (1921) ("it is not within ... the ... power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures"). This case does not require the Court to reexamine any of these precedents.

It is certainly true that, like the many state economic regulations upheld by this Court since 1937, the rent-seeking parties that pushed the ban at issue here offered a consumer-protection rationale as a thin disguise for advancing their own interests. Indeed, the credit-card companies even created a fake consumer group to feign grassroots support for these bans. Memorandum from Kate Krell to Susan Stuntz & Jeff Ross, Hill & Knowlton (July 24, 1987) *available at* http://bit.ly/2fLyUNB.

And it is also true that, like the economic regulations this Court has upheld, the ban at issue here achieves a significant wealth transfer from the public-at-large to the rent seekers by driving consumers to pay with credit cards instead of cash. *See* Pet.

App. 4a (Second Circuit recognizing that "credit-card surcharges are more effective than cash discounts at discouraging credit-card use among consumers"); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, Science, Jan. 30, 1981, at 453-58.[3]

But the similarities end there, because unlike regulations on *economic activity*, this ban governs *speech about economics* and nothing else. It distorts not the marketplace, but the marketplace of ideas. Unlike the price controls this Court has upheld in the past, the ban here does not outlaw a particular price or set of prices: merchants are free to have dual pricing to account for the cost of credit. *See Rowell v. Pettijohn*, 816 F.3d 73, 81 (5th Cir. 2016) ("[S]imilar to New York's law, Texas' does not forbid merchants from charging cash customers a different price than that charged to credit-card customers."); *Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1243 (11th Cir. 2015) ("the no-surcharge law does not ban dual-pricing"). These laws only ban merchants from calling a permissible price by a certain name. And such speech, "which does no more than propose a commercial transaction" is protected under the First Amendment, both because the speaker has a right to convey the truthful information and because the listener has a right to "information as to who is charging what." *Virginia State Bd. of Pharmacy v.*

---

[3] Even those consumers who opt not to use credit cards contribute to this wealth transfer because, in practice, these bans drive merchants to "mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales." Scott Schuh et al., Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 1 (2010).

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-64, 776 (1976). In the context of truthful economic information, the First Amendment both "may prevent the government from prohibiting speech, [and] may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

That swipe-fee laws prohibit only speech is clear from the staff analysis that accompanied the senate bill that eventually became Florida's ban: "It should be noted that from an economic standpoint there is *no difference* between a cash discount, as permitted by [Florida law], and a credit surcharge, as would be prohibited by this bill." App. at A–119, *Dana's R.R. Supply*, 807 F.3d 1235, (Jan. 16, 2015) (emphasis added).[4] If a law does not change anything from "an economic standpoint"—if it makes "no difference"—it does not govern economic activity. To put it in mathematical terms, swipe-fee speech bans prohibit expressing one half of a formula. You can say "A or B" but you may not utter "not A and not B." Claiming that this ban regulates economic activity is like claiming that water consumption is regulated by a law that bans calling a glass "half full" but permits calling it "half empty."

That the swipe-fee laws prohibit only speech is

---

[4] *See also Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong., 32, 43, 60 (Feb. 18, 1981) (credit-card industry representatives testifying that from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use," but explaining support for labeling ban because a surcharge "makes a negative statement about the card to the consumer," and "surcharges talk against the credit industry").

also clear from the Second Circuit's explanation of how the ban operates: it alters how consumers act only by altering how they *think*, due to a "psychological phenomenon known as 'loss aversion[,]' [which] means that 'changes that make things worse (losses) loom larger than improvements or gains' of an equivalent amount." Pet. App. 3a (quoting Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991)). As Florida candidly admitted in the Eleventh Circuit, its purpose in passing its swipe-fee speech ban was to alter how consumers "may feel" when they see a surcharge label instead of a cash-discount label. Appellee's Br. at 38, *Dana's R.R. Supply*, 807 F.3d 1235, (11th Cir. Feb. 26, 2015). If a law only forces an equivalent value to be psychologically framed as a gain instead of a loss, it does not govern economic activity. Rather, it governs *labels* ascribed to economic activity; it governs *information* and *ideas* that trigger certain psychological responses and resultant consumer behavior.

The Second Circuit held that "[b]ecause all that Section 518 prohibits is a specific relationship between two prices, it does not regulate speech." Pet. App. 21a. But the statute does not "prohibit[] the relationship" between a surcharge price and a discount price, because that relationship is mathematically equivalent and to ban one would be to ban the other. The statute instead prohibits one way to express this relationship. In short, these swipe-fee speech bans are not economic regulations; instead, as the Eleventh Circuit put it, they "directly target[] speech to indirectly affect commercial behavior." *Dana's R.R. Supply*, 807 F.3d at 1239.

II. STATE SWIPE-FEE SPEECH BANS ARE RIDDLED WITH INCONSISTENCIES THAT UNDERMINE THE SUPPOSED CONSUMER-PROTECTION RATIONALE.

A. States Inexplicably Exempt Millions Of Transactions From Their Swipe-Fee Speech Bans.

The states with swipe-fee speech bans have attempted to justify the laws by claiming various consumer-protection rationales. New York claims its ban "prevent[s] bad consumer experiences." Corr. Br. of Resp't at 47, *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), (ECF No. 59). Florida claims its ban prevents "consumer confusion." Appellee's Br. at 35, *Dana's R.R. Supply*, 807 F.3d 1235, (11th Cir. Feb. 26, 2015). Texas claims its ban prevents "surprise at the register, where the consumer thinks the posted price is X, goes to the register and realizes that it's actually going to be X plus Y because they're paying with a card." Mtn. Dismiss Tr., 30, Oct. 8, 2014 *Rowell v. Pettijohn*, No. A-14-CA-190-LY, 2015 WL 10818660 (W.D. Tex. Feb. 4, 2015), *aff'd sub nom. Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016) (ECF No. 58). California claims its ban "protect[s] consumers from deceptive price increases for goods and services." Cal. Civ. Code § 1748.1(e).

As noted above, even a passing familiarity with the history of these bans reveals that the only protection truly sought was for the profits of credit-card companies. Pet'rs' Br. 8-19. But the Court need not resort to this legislative history to see that the rationales advanced by the states are illusory. The farce is revealed on the face of the statutes themselves, as states are careful to specify that, when

their governments are acting as merchants, swipe-fee speech is perfectly acceptable and causes no harm to the consuming public. Indeed, *every* state that has a swipe-fee speech ban exempts millions of transactions for no explicable reason.

Let us look first to the Respondent in this case, the State of New York. Although the New York Attorney General told the Second Circuit that "credit-card surcharges are prohibited across the board," Corr. Br. of Resp't at 47, *Expressions Hair Design*, 808 F.3d 118, (ECF No. 59), the state actually exempts itself from this blanket prohibition. *See, e.g.*, N.Y. Crim. Proc. Law § 420.05 (court system may use surcharge labels); N.Y. Pub. Auth. Law § 1045-j(4-a)(b) (water board may use surcharge labels); N.Y. Gen. Mun. Law § 5 (local governments may use surcharge labels). Suppose, then, that a New Yorker rushing to work hurriedly parks while he pops into a deli to grab a morning cup of coffee and a bite to eat, pays with a credit card, comes out to an unwelcome parking ticket, and later in the day attempts to pay the ticket online. Here is the public notice he will find on the City of New York's website:

> The City of New York offers multiple payment options. As a convenience to you, the City of New York accepts credit or debit cards. If you choose to pay with a credit or debit card, you **will** be charged a fee of 2.49% of the payment amount. This fee is **nonrefundable**. You will see this amount before you check out. The fee will be shown as a separate charge on your credit or debit card statement, and the New York City Department of Finance will be the

> merchant. This fee is used to cover the cost of processing credit and debit cards.

Paying a Parking or Camera Violation Online, City of New York, http://on.nyc.gov/2eGm5lz (emphasis in orginal).

Thus, while the New Yorker might be baffled as to why he received a ticket, and in the dark as to how much the credit on his bagel cost, he will know exactly what fee "the merchant" attaches, at "check out," to paying the ticket by credit card. New York cannot explain why the consumer must be shielded from knowing the swipe-fee cost on the $1.00 bagel transaction, but not from knowing the swipe-fee cost on the $65 payment for a parking ticket. And this is no small exception to New York's purported consumer-protecting ban on swipe-fee labels. New York City issued 11.8 million parking tickets in 2015. *Parking Violations Issued – Fiscal Year 2015*, City of New York, http://bit.ly/2eJMsJa. Parking tickets accounted for $565 million in revenue, with one-third of all tickets paid by credit card. Scott M. Stringer, *NYC Budget Brief* (Mar. 2016), *available at* http://on.nyc.gov/2fIOztB. Overall, the city collected almost $2 billion in annual fines and fees, including $10.5 *million* from credit-card surcharges, *id.*—what the city calls a "convenience fee," rather than dangerous merchant speech.

In Florida, whose ban is the subject of a petition for certiorari pending before this Court, state agencies accepting credit and debit cards are permitted to "impose a convenience fee" that reflects "the total cost to the state agency." Fla. Stat. § 215.332(3)(b); see also Fla. Admin. Code § 69C-4.0045. And local gov-

ernments are permitted "to surcharge the person who uses a credit card, charge card, bank debit card, or electronic funds ... an amount sufficient to pay the service fee charges by the financial institution, vending service company, or credit card company for such services." Fla. Stat. § 215.332(5). To add insult to injury, a 2013 government report states that "[s]mall businesses"—the very ones, like Dana's Railroad Supply, which are muzzled by Florida's swipe-fee speech ban—"may be required to comply with this rule [allowing government surcharges] when paying by payment card or electronic check." Fla. Dep't Fin. Servs., *Compliance Economic Review, Rule 69C-4.40045, Fla. Admin. Code, Convenience Fees* (Apr. 2013), *available at* http://bit.ly/2fzTwHB. According to that same 2013 report, all of this surcharging meant that "[o]ver the last five fiscal years, $15.58 million in convenience fees have been imposed on payments made to state agencies, while $11.70 million have been imposed on payments made to local governments." *Id.* Despite Florida's purported fears about consumer reactions to swipe-fee labels, no mass confusion over the issue has erupted between the state and local governments and taxpayers.

On the other side of the Gulf of Mexico, when it comes to swipe-fee bans and Texas, the state's motto appears to be: "Don't Mess with Taxes." The state's law, which is also the subject of a pending petition for certiorari, specifies that the ban "does not apply to a state agency, county, local governmental entity, or other governmental entity." Tex. Fin. Code § 339.001(b). Accordingly, if a Texan wants to pay his taxes online, the Comptroller's website notifies him that "[t]here is a non-refundable credit card portal processing fee that will be included in the transac-

tion, [and] this fee is based on the amount of tax paid." *Pay With Credit Card*, Tex. Comptroller, http://bit.ly/2g0C1Rs. Thus, despite Texas's claim that it must protect its consumers from surprise, a Texan will get one price on his tax bill, and then when he "goes to the register" on the Comptroller's website, he will "realize[] that it's actually going to be X plus Y." Mtn. Dismiss Tr., 30, Oct. 8, 2014 *Rowell v. Pettijohn*, No. A-14-CA-190-LY (ECF No. 58).

In California, whose swipe-fee speech ban is pending before the Ninth Circuit, "a court, city, county, city and county, or any other public agency may impose a fee for the use of a credit or debit card." Cal. Gov. Code § 6159(h); *see also* Cal. Civ. Proc. Code § 1010.5 (permitting California state courts to impose credit-card surcharges on fax filings); Cal. Food & Agric. Code § 31255(b) (permitting state animal-control officers to impose credit-card surcharges). The city of San Francisco thus proudly displays the cost of surcharges on all of its parking meters, and though the public might lament how difficult it is to find parking in the city, they are at least informed as to its cost. Tim Fang, *Credit Card Transaction Fee Goes Into Effect at San Francisco Parking Meters*, CBS SFBayArea, (Aug. 17, 2015 6:37 PM), http://cbsloc.al/2f4bjCI.

Worse still, California exempts an entire industry from the speech ban, as it "does not apply to charges for payment by credit card or debit card that are made by an electrical, gas, or water corporation and approved by the Public Utilities Commission." Cal. Civ. Code § 1748.1(f). Thus, in California, a light bulb purchase cannot be labelled with a surcharge, but the purchase of power to run the light bulb may be labeled with a surcharge. California has energy

problems, but consumer harm from knowing the cost of paying for electricity by credit card has not been identified as one of them.

Up in Maine, "a governmental entity may impose a surcharge for payments made with a credit card or debit card for taxes, fines, charges, utility fees, regulatory fees, license or permit fees or the provision of a specific service." Me. Rev. Stat. tit. 9-A, § 8-509. Indeed, when the government is doing the charging, Maine engages in a complete about-face as to the information that will be helpful to consumers: the credit surcharge information must be "disclosed clearly to the consumer prior to payment." *Id.*

In Colorado, "no seller" may use the surcharge label, Colo. Rev. Stat. § 5-2-212(1), unless that seller happens to be a "state governmental entity" or a "local governmental entity," which freely "may impose a convenience fee on persons who use" credit cards, with such fee "not [to] exceed the actual additional cost incurred by the state [or local] governmental agency to process the transaction," *id.* §§ 24-19.5-103(3), 29-11.5-103(3).

In Kansas, cities "shall not be subject" to the ban, and "may set a fee to be added to each credit card transaction equal to the charge paid by the city for the use of the credit card," so long as "the city shall provide notice of such fee to the person making payment by credit card." Kan. Stat. Ann. § 12-16,125.

In Oklahoma, the state permits municipalities to charge "a convenience fee" commensurate with the actual cost of the credit transaction. Okla. Stat. tit. 14A, § 2-211. Moreover, Oklahoma does not even believe that all private-sector merchants must have

their speech prohibited to protect consumers, as "private educational institution[s]" are also permitted to charge a convenience fee. *Id.*

Finally, in New England, both Connecticut and Massachusetts have put surcharge notices to good use across municipalities and government entities. For example, the Bursar's office at Central Connecticut State University has a helpful notice on its webpage recognizing that "many students and families appreciate the convenience of using a credit card," and explaining that, pursuant to a 2011 resolution of the Board of Trustees of the Connecticut University System, "a 2.5% non-refundable convenience fee" would be applied to all such transactions. *Credit Card Convenience Fee FAQ*, Cent. Conn. State Univ., http://bit.ly/2fk48qX.

The City of Hartford's Tax Collection Office has a friendly Frequently Asked Questions page, and one such question is: "May I pay my taxes with a credit or debit card?" The city answers: "For those taxpayers who choose to pay with Master Card there is a 2.50% convenience fee charged." *Tax Payment Information FAQ*, City of Hartford, http://bit.ly/2fk8iPX. And the city is careful to let taxpayers know: "This fee does not go to the City but to the bank for the transaction processing costs." *Id.* Hartford wants its taxpayers to know it is not taking one dime extra from them when they pay by credit card, but a merchant who pays taxes to the city is not permitted to provide this same information to his customers.

The City of Cambridge, Massachusetts permits citizens to pay a whole host of bills online with a credit or debit card. But the city, on its website, is careful to note it charges a convenience fee—actually,

eighteen different convenience fees depending on the type of card and type of bill being paid. *Pay and View Bills Online*, City of Cambridge, http://bit.ly/2fYXkk1. This is all clearly labeled for the payer in a multi-cell grid, each cell of which includes examples of the underlying "payment" and the "fee" charged on top of it. *Id.* Despite the state's general concern over confusion from swipe-fee disclosures, there are no known reports of Harvardians being duped by Cambridge's swipe-fee grid.

Not to be outdone, across the Charles River, "[t]he City of Boston offers residents an easy and convenient online payment system," but residents are warned that the "credit/debit card service charge is 2.75% of the total payment ($1.00 minimum)." *Pay and/or View Bills Online*, City of Boston, http://bit.ly/2f7Eqbz.

The examples could go on and on, but this handful is enough to demonstrate the point: the Swiss-cheese nature of swipe-fee speech bans undermines any purported consumer-protection rationale the censoring states have put forth. Each and every day, scores of thousands of credit-card transactions occur in these states and the cost and source of surcharges is clearly communicated at the point of sale. The consuming public appears able to navigate these transactions without harm.

As this Court has explained time and again, this type of underinclusiveness in a law prohibiting speech "undermines the likelihood of a genuine state interest." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978); *see also FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) (underinclusiveness "renders doubtful ... any genuinely substan-

tial governmental interest" justifying a speech ban); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) (discrediting purported aesthetic rationale for sign ordinance because law was "hopelessly underinclusive"). In particular, "exemptions and inconsistencies bring into question the purpose of [a] labeling ban." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995).[5]

B. Swipe-Fee Speech Bans Create Hidden And Deceptive Costs That State Consumer-Protection Laws Typically Prohibit.

Swipe-fee speech bans are not only internally inconsistent, but also stand as glaring and inexplicable exceptions to the overall framework of state laws that prohibit deceptive pricing and trade practices. Each of the ten states that has a swipe-fee speech ban also has a law prohibiting unfair and deceptive practices.[6] Typically, when states seek to protect consumers

---

[5] This Court has taught this lesson to the State of Florida, in particular, on numerous occasions, yet the Sunshine State's swipe-fee speech ban remains on the books. *See Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("facial underinclusiveness of [the law] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which [it] invokes"); *Erznoznik v. Jacksonville*, 422 U.S. 205, 215 (1975) ("underinclusive classification" undermines "presumption of statutory validity" in First Amendment context); *cf. Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 545-46 (1993).

[6] Cal. Bus. & Prof. Code §§ 17200 et seq.; Colo. Rev. Stat. §§ 6-1-101 et seq.; Conn. Gen. Stat. §§ 42-110a et seq.; Fla. Stat. §§ 501.201 et seq.; Kan. Stat. Ann. §§ 50-623 et seq.; Me. Rev. Stat. Ann. tit. 5, §§ 205A et seq.; Mass. Gen. Laws Ann. ch. 93A, §§ 1 et seq.; N.Y. Exec. Law § 63(12) and N.Y. Gen. Bus. Law §§ 349-50; Okla. Stat. tit. 15, §§ 751 et seq.; and Tex. Bus. & Com. Code Ann. §§ 17.41.

from deceptive pricing, they require *more* disclosure to the consuming public rather than an obfuscation of underlying costs.

For example, while New York bans separate disclosure of the cost of credit, it positively requires separate disclosure of the cost of taxes collected by merchants. *See* N.Y. Tax Law § 1132(a)(1). Left unexplained is why disclosure of one surcharge is good for consumers but the disclosure of another is not.

In another example, New York's Attorney General, at the same time he was defending the state's swipe-fee speech ban in the Second Circuit, announced a settlement of an enforcement action against mobile carriers in which he henceforth required the mobile companies to "present third-party charges in a dedicated section of consumers' mobile phone bills, [and to] clearly distinguish them from the carrier's own charges." *A.G. Schneiderman Announces $158 Million Mobile Cramming Settlements With Sprint And Verizon*, Attorney General of New York, http://on.ny.gov/2eJzB9P. What is not required, however, is a disclosure of the source and cost of credit charges if a mobile bill is paid by credit card. Again, left unexplained is why a clear disclosure of one type of surcharge benefits the public, but a clear disclosure of another does not.

Florida provides another example. There, a merchant can only advertise "wholesale" pricing if the good is "offered by the seller at or below his or her delivered net cost price," and "[a]ny retailer using the term or phrase" must "upon demand by a customer, forthwith make available ... for inspection, invoices, or shipping charges ... of any goods ... so offered for

sale ... indicating the delivery net cost to the seller of the particular goods." Fla. Stat. §§ 817.41(2)-(3). Thus, Florida requires complete, on-demand disclosure of underlying costs for products offered at "wholesale" prices, but positively bans complete disclosure of credit costs that are added to those wholesale prices at the point of sale.

In Texas and California, it is generally illegal to "mak[e] false or misleading statements of fact concerning [the] reasons for, existence of, or amount of price reductions," Tex. Bus. & Com. Code § 17.46(b)(11), Cal. Civ. Code § 1770(a)(13), yet the same seller is prohibited from honestly labelling the reason for a price increase from swipe fees at the point of sale.

Also in California, merchants advertising the price of "prepaid calling cards" must "clearly and conspicuously disclose" "[a]ll ancillary charges," including "all surcharges ... that may be imposed in connection with the use of a card or services." Cal. Bus. & Prof. Code § 17538.9. All surcharges, that is, except for the one that is assessed if the calling card is purchased on credit.

In Oklahoma, it is illegal to engage in a "deceptive trade practice," which is any "misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person." Okla. Stat. tit. 15, § 752. Unless, of course, the omission is a credit surcharge label, which even the Second Circuit explained is more likely to lead a consumer to spend more money on credit. Pet. App. 4a. Oklahoma also outlaws any "false or misleading statements of fact ... concerning the price of the subject of a consumer

transaction or the reason for, existence of, or amounts of price reduction." Okla. Stat. tit. 15, § 753. Unless, of course, the deception is that credit is costless.

In Connecticut and Maine, if a resident seeks to sell property, he will have to comply with extensive disclosure laws, mandating advanced notice of such items as the annual cost of operating the heating system and whether the property is located in a special tax district. Conn. Gen. Stat. § 20-327b; Me. Rev. Stat. tit. 33, § 173. The statutes also mandate when these disclosures are to be made: before a binding contract to purchase the property is executed by the buyer and seller. Conn. Gen. Stat. § 20-327b; Me. Rev. Stat. tit. 33, § 174. Yet, after the sale, if the new homeowner visits a home-improvement store, he will not be informed of the cost purchasing paint with a credit card.

As the district court in this case explained, "the speech restricted by section 518 concerns lawful conduct and is non-misleading," and by "truthfully and effectively conveying the true costs of using credit cards, surcharges can actually make consumers more informed rather than less, thus furthering rather than impeding the purposes of the First Amendment." Pet. App. 76a. The same is true of consumer-protection laws. The swipe-fee speech ban "actually perpetuates consumer confusion by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." *Id.* at 77a.

The incongruity between swipe-fee speech bans and the broader consumer-protection goals in these states undermines the purported rationale. *See, e.g.*,

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 352-54 (1977) (purported consumer-protection rationale for labeling requirement undermined by inconsistency with broader regulatory framework).

C. Swipe-Fee Speech Bans Invert The Role Of State Attorneys General.

Typically, a state attorney general is the officer on the beat for consumer protection, enforcing price transparency and truth in marketing. A quick look at the attorney general's website in any of the ten states that have swipe-fee speech bans will confirm the prominence of this role. *See, e.g.*, *Bureau of Consumer Frauds & Protection*, Att'y Gen. of N.Y., http://on.ny.gov/2f7OrFK. Swipe-fee speech bans invert this role, forcing attorneys general to suppress truthful market information. And suppress they have.

New York's enforcement history is robust, with the Attorney General conducting sting operations and taking enforcement actions where the price difference between credit-card and cash transactions was communicated in the wrong way. Pet'rs' Br. 14-16. New York also has a reported case dating back to 1987 in which a merchant was convicted under the no-surcharge law for the phraseology his employee used in communicating credit costs to the customer. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1010 (N.Y. Crim. Ct. 1987) (overturning the conviction on constitutional grounds).

In Florida, the Attorney General's office has sent letters to merchants threatening criminal prosecution for continued disclosure of swipe-fee costs. App. at A–70, A–80, *Dana's R.R. Supply*, 807 F.3d 1235, (11th Cir. Jan. 16, 2015) ("Consequently, if you are charg-

ing a surcharge to customers who pay for a transaction with a credit card, as defined in the statute, please suspend this practice immediately to avoid the possibility of further action by our office.").

Now that credit-card companies have freed merchants from contractual speech bans, Texas has created a new enforcement mechanism for its governmental ban. Effective September 2013, the Texas Office of Consumer Credit Commissioner ("OCCC") has authority to enforce the ban, which it has done in at least one case. The Texas OCCC sent a letter threatening prosecution if the merchant did not cease telling customers that paying with a credit card costs more. Pls.' Mtn. for Prelim. Inj. at 7, *Rowell v. Pettijohn*, A-14-CA-190-LY, 2015 WL 10818660, at *1 (W.D. Tex. 2015), *aff'd sub nom. Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016) (ECF No. 32).

California has no reported enforcement actions, but the state's Attorney General acknowledged during argument in the district court that if credit-card surcharge labels were to become widespread, or if a large retail chain such as Wal-Mart or Home Depot were to begin disclosing swipe fees for credit-card transactions, then the Attorney General would likely take enforcement action. *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1206 (E.D. Cal. 2015).

D. Swipe-Fee Speech Bans Are Vague And Permit Arbitrary Enforcement.

Perhaps the most harmful inconsistency in swipe-fee speech bans is that their explicit text can be read in different and uncertain ways, leaving merchants clueless as to which words are illegal and which are not.

"[C]larity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). A statute is thus unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Holder v. Humanitarian Legal Project*, 561 U.S. 1, 13 (2010) (internal quotation marks omitted). The public cannot be left to "guess at [a statute's] meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). And when a statute "interferes with the right of free speech, ... a more stringent vagueness test should apply." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The vagueness of swipe-fee speech bans is unavoidable because the regulation is a logic-defying prohibition. The statute enshrines the fallacy that a credit-card surcharge and a cash discount—economic twins—are somehow different. This difference cannot be expressed, unless the difference is only a matter of words. And thus the question becomes: which words may be safely uttered?

The Second Circuit thought this an easy riddle to solve. It recognized that New York's ban "permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers. (That is, it allows what we have termed 'cash discounts.')." Pet. App. 14a. The court offered an illustration: "if a seller's regular price is $100, it may not charge credit card customers $103 and cash customers $100, but if the seller's regular price is $103, it *may* charge credit-card customers $103 and cash customers $100." *Id.*

But if we play out the Second Circuit's example, can the seller say any of the following to the cash-paying customer?

- "I am not charging you the three-dollar cost of credit, which is factored into the regular price."
- "I am not charging you the three-dollar credit surcharge, which is already reflected on that sticker."
- "There is a cash discount off that regular price. So if you change your mind and pay with credit, you are going to have to pay three dollars more."

And can the seller say any of the following to the credit-paying customer?

- "Because you are paying with a credit card, I am not discounting the three-dollar swipe fee."
- "Because you are paying with a credit card, you are not entitled to the three-dollar cash discount, and so you pay more using the credit card."
- "If you pay with cash, you won't have to pay the extra three dollars this regular price reflects."
- "If you pay with cash, you are paying three dollars less for not using a credit card."

Or suppose two customers are in the store, one with a credit card and one with cash, and they ring up the same good at two adjacent registers and see the price

difference. Would portions of the following conversation be illegal?

Credit customer: "Hey, how come he's paying three dollars less for the same thing?"

Cashier 1: "He's getting the cash discount."

Credit customer: "So it's cheaper to pay with cash than with credit?"

Cashier 1: "Yes."

Cash customer: "So how much more does it cost if I switch to credit?"

Cashier 2: "Paying with credit costs $3.00 more."

Cash customer: "Credit costs that much?"

Third customer (waiting in line): "Oh, yes, every time you pay with credit anywhere in the country, there is a surcharge. This store bakes the surcharge into its sticker price."

Cash customer (turning to Cashier 1): "Is that right? There's a credit surcharge?"

Manager (rushing from the backroom): "We are not at liberty to discuss that!"

Cashier 1: {nodding} "Right. You didn't hear that from me. I'm not supposed to say that." {winking}

Cashier 2: "Oh come on! We just told you that cash is cheaper every time. So

> yes, there's a fee every time you swipe the credit card."

A person of ordinary intelligence could not possibly solve this semantic Gordian knot.

CONCLUSION

For the foregoing reasons, and those set forth by Petitioners, the Court should reverse the Second Circuit and hold that New York's swipe-fee speech ban violates the First Amendment.

Respectfully submitted,

JOSEPH W. JACQUOT
FOLEY & LARDNER LLP
1 Independent Dr.
Suite 1300
Jacksonville, FL 32202
(904)359-2000
jjacquot@foley.com

JESSE PANUCCIO
Counsel of Record
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
(202) 672-5300
jpanuccio@foley.com

ROBERT HENNEKE
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
(512) 472-2700
rhenneke@texaspolicy.com

JOSHUA M. HAWKES
FOLEY & LARDNER LLP
106 E. College Ave.
Suite 900
Tallahassee, FL 32301
850-222-6100
jhawkes@foley.com

Counsel for Amici Curiae

November 2016